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No. 14-114

IN THE

Supreme Court of the United States

DAVID KING, *et al.*,

Petitioners,

v.

SYLVIA BURWELL, SECRETARY OF HEALTH AND HUMAN SERVICES, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF WASHINGTON LEGAL FOUNDATION AND STEVEN J. WILLIS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Section 36B of the Internal Revenue Code, which was enacted as part of the Patient Protection and Affordable Care Act (ACA), authorizes federal tax-credit subsidies for health insurance coverage that is purchased through an "Exchange established by the State under section 1311" of the ACA.

The question presented here is whether the Internal Revenue Service (IRS) may permissibly promulgate regulations to extend tax-credit subsidies to coverage purchased through exchanges established by the federal government under section 1321 of the ACA.

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IN THE

Supreme Court of the United States

NO. 14-114

BRIEF OF WASHINGTON LEGAL FOUNDATION AND STEVEN J. WILLIS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

INTERESTS OF *AMICUS CURIAE*[1]

Washington Legal Foundation (WLF) is a public-interest law firm and policy center with supporters in all 50 states. WLF devotes a substantial portion of its resources to defending and promoting free enterprise, individual and business civil liberties, a limited, accountable government, and the rule of law. To that end, WLF routinely litigates in support of efforts to ensure a strict separation of powers as a means of preventing too much power from being concentrated within a single governmental branch. *See, e.g., Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012); *Free Enterprise Fund v. Public Co. Accounting Oversight*

[1] Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than *amici* and their counsel, made a monetary contribution intended to fund the preparation and submission of this brief. All parties have consented to the filing of this brief; letters of consent have been lodged with the Clerk.

Bd., 561 U.S. 477 (2010). WLF also regularly appears as *amicus curiae* before this Court in cases to ensure that undue deference is not accorded to federal regulatory agencies. *See, e.g.*, *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156 (2012); *Alexander v. Sandoval*, 532 U.S. 275 (2001).

Steven J. Willis is Professor of Law at the University of Florida's Levin College of Law, where he teaches a wide range of courses on federal tax law and policy. The author of dozens of scholarly articles and coauthor of two textbooks, Professor Willis is expertly familiar with the legislative grace canon of statutory construction, which requires that all tax credits must be expressed in clear and unambiguous terms. Professor Willis agrees with Petitioners that the legislative grace canon operates with full force in this case to foreclose the IRS's expansive interpretation of § 36B of the Internal Revenue Code.

Amici believe that, absent a clear statutory mandate from Congress to do so, the IRS lacks the authority to appropriate billions of dollars from the public treasury each year to subsidize health insurance coverage in more than two-thirds of the States. A contrary view would not only permit regulatory agencies to essentially rewrite federal law, but it would invite further administrative abuses of power.

Congress's ability to cabin administrative overreach by drafting legislation is one of its chief means of keeping Executive Branch power in check. Because Congress as an institution moves slowly and deliberately, Congress relies substantially on

the federal courts to ensure respect for the proper boundaries of federal statutes. Otherwise, the aggrandizement of agency power will accumulate steadily, and the constitutional scheme of checks and balances could be rendered a dead letter

STATEMENT OF THE CASE

In 2010, Congress enacted the Patient Protection and Affordable Care Act (ACA), which, *inter alia*, regulates the individual health insurance market by establishing insurance exchanges. *See* 42 U.S.C. § 18031(b)(1). Both a gatekeeper and a gateway to health insurance coverage, an exchange is a "governmental agency or nonprofit entity" that establishes websites to allow individuals to enroll in health insurance plans that satisfy federal standards. *See id.* §§ 18031(b)(1), (d)(1)-(d)(4)

Section 1311 of the ACA delegates to the States the primary responsibility for establishing exchanges. *See* 42 U.S.C. § 18031(b)(1). If a State refuses or fails to set up an exchange, § 1321 authorizes the federal government, acting through the Secretary of Health and Human Services (HHS), to "establish and operate such Exchange within the State." *Id.* § 18041(c)(1). To date, only 14 States and the District of Columbia have established exchanges under the ACA. The federal government has established exchanges in the remaining 36 States, including Virginia.

Section 36 of the Internal Revenue Code, enacted as part of the ACA, authorizes refundable tax credits, in the form of a subsidy paid by the U.S. Treasury directly to an individual's insurer, as an

offset against health insurance premiums. *See* 26 U.S.C. § 36B. As an extra incentive for States to establish their own exchanges, this tax credit is available to subsidize only the purchase of insurance on an "Exchange *established by the State* under section 1311 of the [ACA]." *Id.* § 36B(c)(2)(A)(i) (emphasis added). Unless an individual obtains health insurance coverage through a State-established exchange, no tax credit is available.

"Congress did not expect the states to turn down federal funds and fail to create and run their own Exchanges." Pet. App. 70a. Thus, while Congress appropriated unlimited funds to help States establish exchanges under § 1311, Congress appropriated *no* funds for HHS to build federal exchanges under § 1321. *See* 42 U.S.C. § 18031(a). As Professor Jonathan Gruber, one of the ACA's architects, cautioned: "If you're a state and you don't set up an Exchange, that means your citizens don't get their tax credits." Jonathan Gruber, Address to Noblis (January 18, 2012), *available at* https://www.youtube. com/watch?v=GtnEmPXEpr0.

Nevertheless, in May 2012, the IRS promulgated a regulation that interpreted § 36B to allow tax credits to subsidize the purchase of insurance "regardless of whether the Exchange is established and operated by a State . . . or by HHS." 45 C.F.R. § 155.20 (the IRS Rule). Under the IRS Rule, then, federal tax credits are available to subsidize insurance premiums in *every* State, even those States that refused to establish their own exchanges. 77 Fed. Reg. 30,377 (May 23, 2012).

The ACA also imposes an individual mandate, which requires individuals to maintain "minimal essential coverage" or else pay a penalty. *See* 26 U.S.C. § 5000A(a)-(b). The penalty does not apply to those individuals for whom the annual cost of the cheapest available coverage—*less* any tax credits—would exceed eight percent of projected household income. *See id.* § 5000A(e)(1)(A)-(B). Thus, by making tax credits available in those 36 States with federal exchanges, the IRS Rule dramatically increases the number of people who must purchase health insurance or pay the penalty as compared to the number under the ACA as written. The IRS Rule also broadens the sweep of the employer mandate, which similarly uses the threat of penalties to induce employers to provide their full-time employees with health insurance. *See* 26 U.S.C. § 4980H(a). [2]

Petitioners are low-income Virginia residents who do not wish to comply with the ACA's individual mandate. Pet. App. 9a. As a result of the IRS Rule, Petitioners are now eligible to receive tax credits for the federal exchange. *Id.* But the availability of such credits also makes Petitioners subject to penalties under the ACA's individual mandate for failing to purchase health insurance. *Id.* Petitioners brought suit in the U.S. District Court for the Eastern District of Virginia, alleging that the IRS Rule

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[2] If tax credits were unavailable in the 36 States with only federal exchanges, employers there would face no penalty for failing to offer coverage. By authorizing tax credits in those States, the IRS Rule exposes employers there to substantial penalties, which the statute as written would not otherwise impose.

exceeds the agency's statutory authority, is arbitrary and capricious, and is contrary to law in violation of the Administrative Procedure Act (APA). *Id.* at 9a-10a.[3]

In February 2013, the district court granted the Government's motion to dismiss the complaint. Although conceding that Petitioners' "plain meaning interpretation of section 36B has a certain common sense appeal," Pet. App. 71, the district court disagreed, finding that the ACA "as a whole" unambiguously evinced Congress's intent to make tax credits available to every State. The court divined that supposedly clear intent from the absence of any "direct support in the legislative history" for Petitioners' interpretation, as well as the ACA's goal of "ensur[ing] broad access to affordable health care for all." *Id.* at 70a-71a.

On appeal, the Fourth Circuit affirmed, deferring to the IRS's interpretation under *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). Relying on the legal fiction that HHS "acts on behalf of the state when it establishes its own Exchange," Pet. App. at 18a, the court found the ACA to be ambiguous as to whether an exchange established by HHS also constitutes an exchange "established by the State" under § 1311. Pet. App. 17a-18a. To resolve this purported ambiguity, the court reasoned that "the importance of the tax

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[3] At least three other lawsuits raise identical issues. *See Halbig v. Burwell*, 758 F. 3d 390 (D.C. Cir. 2014); *Oklahoma ex rel. Pruitt v. Burwell*, No. 6:11-cv-30, 2014 WL 4854543 (E.D. Okla. Sep. 30, 2014); *Indiana v. IRS*, No. 1:13-cv-1612, 2014 WL 3928455 (S.D. Ind. Aug. 12, 2014).

credits to the overall scheme" makes it "reasonable to assume that Congress created the ambiguity" so that the IRS could resolve it. *Id.* 27a. In short, because the IRS Rule advanced "the broad policy goals of the Act" as the court understood them, *id.* at 27a, the panel upheld the IRS's interpretation under *Chevron* step two.

SUMMARY OF ARGUMENT

This case presents a straightforward question of statutory interpretation: whether the IRS may extend tax-credit subsidies to health insurance coverage purchased through federally established exchanges under section 1321 of the ACA. WLF agrees with Petitioners that nothing in the text, structure, or legislative history of the ACA gives the IRS the sweeping authority to allocate billions of dollars a year in federal spending to subsidize health insurance purchased on federal exchanges. Absent congressional authorization, granting any administrative agency such unbridled discretion is not only an invitation to abuse, it is the very antithesis of modern administrative law.

On its face, the text of the ACA directly and unambiguously answers the question presented in this case. Under any fair reading of § 36B, tax credits are available *only* for plans "enrolled in through an Exchange *established by the State* under section 1311 of the [ACA]." *See* 26 U.S.C. § 36(B)(c)(2)(A)(i) (emphasis added). Deferring to the IRS's contrary view—that an exchange established by the federal government is somehow "an Exchange established by the State"—is unwarranted because the language of the statute is plain, and the IRS's

interpretation cannot be reconciled with it. *Chevron*, 467 U.S. at 842-43. In the absence of any statutory ambiguity, deferring to the IRS's counterintuitive interpretation of § 36B would undermine the carefully calibrated framework of *Chevron* by improperly transferring legislative prerogative from Congress to the agency.

Even if § 36B were ambiguous—which it is not—the familiar statutory interpretation canon that requires all tax credits to be expressed in clear and unambiguous terms, eliminates altogether the IRS's discretion to resolve that ambiguity. Given Congress's undisputed role as the guardian of the public fisc, tax credits are "matters of legislative grace," which must be strictly construed. Hence, if any ambiguity remains, it must be resolved against the existence of a tax credit. Because nothing in the ACA "unquestionably and conclusively" establishes that purchasers of insurance through a federal exchange are entitled to a tax credit, the canon controls and "there is, for *Chevron* purposes, no ambiguity in such a statute." *INS v. St. Cyr*, 533 U.S. 289, 320 n.45 (2001). In sum, the unambiguous text of the ACA buttressed by application of the legislative grace canon forecloses any deference to the IRS's interpretation of § 36B. In the absence of deference, the Court should vacate the IRS Rule.

ARGUMENT

I. *CHEVRON* STEP ONE RESOLVES THE QUESTION PRESENTED AGAINST EXTENDING TAX CREDITS TO FEDERAL EXCHANGES

A. The *Chevron* Framework Safeguards Vital Separation-of-Powers Concerns

In the seminal case of *Chevron U.S.A. v. Natural Resources Defense Council*, this Court cautioned that "federal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do." 467 U.S. at 866. The Court went on to emphasize that "[t]he responsibilities for assessing the wisdom of . . . policy choices and resolving the struggle between competing views of the public interest are not judicial ones." *Id.* Rather, "[o]ur Constitution vests such responsibilities in the political branches." *Id.* (quoting *TVA v. Hill*, 437 U.S. 153, 195 (1978)).

Mindful of the separation of powers, then, *Chevron* established a two-step framework for reviewing an agency's interpretation of a statute that it administers. In crafting that framework, the Court "relied on basic principles of democratic government: Policy choices are for the political branches, and Congress is the Supreme branch for making such choices." *Miss. Poultry Ass'n, Inc. v. Madigan*, 31 F.3d 293, 299 (5th Cir. 1994) (*en banc*).

Under *Chevron* step one, courts must use "traditional tools of statutory construction" to

determine whether Congress's meaning is clear on the question at issue. *Chevron*, 467 U.S. at 843 & n.9. If Congress's meaning is clear, "that is the end of the matter" and both the court, as well as the agency, "must give effect to the unambiguously expressed intent of Congress." *Id.* at 842-43. This approach reinforces Congress's unique role in making policy choices by giving primacy to those choices.

Step two of the *Chevron* analysis also helps to preserve the separation of powers among the legislative, executive, and judicial branches. Step two applies only where "the court determines that Congress has not directly addressed the precise question at issue," *and* that Congress has delegated authority to address the issue to the agency. *Id.* at 843. If, but only if, the agency possesses that delegation and the language of the statute is found to be ambiguous on the question at issue is the reviewing court allowed to proceed to the second step of the *Chevron* inquiry, which asks "whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843.

By conditioning step-two deference on lingering statutory ambiguity that could not be resolved at step one, "*Chevron* is not quite the 'agency deference' case that it is commonly thought to be by many of its supporters (and detractors)." *Miss. Poultry Ass'n*, 31 F.3d at 299 n.34. Rather, the *Chevron* framework recognizes that an agency's discretion to act depends entirely on a delegation of authority from Congress. Indeed, the *Chevron* Court's command that deference is due only when Congress has not spoken clearly is quite blunt: "The

judiciary . . . *must* reject administrative constructions which are contrary to clear congressional intent." *Chevron*, 467 U.S. at 843 n.9 (emphasis added).

B. Because the ACA's Meaning Is Clearly Ascertainable, No Deference Is Warranted

An administrative agency may exercise only those powers granted by the statute reposing power in it. *See, e.g., INS v. Chadha*, 462 U.S. 919, 955 n.19 (1983) ("Congress ultimately controls administrative agencies in the legislation that creates them."). This Court has consistently refused to defer to regulatory "rights-creating language" that is contrary to the statutory text. *See Alexander v. Sandoval*, 532 U.S. 275 (2001) (holding that "language in a regulation . . . may not create a right that Congress has not").

As Petitioners persuasively demonstrate in their opening brief, application of the "traditional tools of statutory construction" reveals that, under any fair reading of § 36B, subsidies are available *only* for plans "enrolled in through an Exchange *established by the State* under section 1311 of the [ACA]." *See* 26 U.S.C. § 36(B)(c)(2)(A)(i) (emphasis added). No accepted principle of statutory interpretation would ever construe the phrase "Exchange established by the State under section 1311" to actually mean "Exchange *established by HHS under section 1321*." And the Government simply offers no textual basis for concluding that a federally established exchange is, in fact, an "Exchange[s] established by the State."

If any doubt were to remain on this score, the ACA's statutory context eliminates it. In a nearby section, the ACA provides that a U.S. territory that "elects . . . to establish an Exchange . . . shall be treated as a State" for purposes of § 1311. *See* 42 U.S.C. § 18043(a)(1). Thus, while Congress knew how to deem a non-State entity to be a State for purposes of § 1311 when it wanted to, it made no such provision for exchanges established by HHS under § 1321. *See Nat'l Fed'n of Indep. Bus.*, 132 S. Ct. at 2583 ("Where Congress uses certain language in one part of a statute and different language in another, it is generally presumed that Congress acts intentionally."). Moreover, because it fully expected that § 36B's tax credits would incentivize the States to establish their own exchanges, Congress appropriated unlimited funds to help States establish exchanges under § 1311, but appropriated *no* such funds for HHS to build federal exchanges under § 1321. *See* 42 U.S.C. § 18031(a).

Absent any statutory ambiguity, deferring to the IRS's interpretation of § 36B would undermine the carefully calibrated framework of *Chevron* by improperly transferring legislative prerogative from Congress to the agency. Under *Chevron* step one, then, IRS's attempt to allocate billions of dollars a year in federal spending to subsidize health insurance coverage purchased on federal exchanges must be rejected as ultra vires because the ACA plainly does not authorize such spending. This Court "expect[s] Congress to speak clearly if it wishes to assign to an agency decisions of vast 'economic and political significance.'" *Util. Air Regulatory Group v. EPA*, 134 S. Ct. 2427, 2444 (2014) (citation omitted).

Indeed, "under *Chevron*, deference to [an agency's] statutory interpretation is called for only when the devices of judicial construction have been tried and found to yield no clear sense of congressional intent." *Gen. Dynamics Land Sys. v. Cline*, 540 U.S. 581, 600 (2004). And "judges cannot cause a clear text to become ambiguous by ignoring it." *Deal v. United States*, 508 U.S. 129, 136 (1993). Where the ACA is concerned, Congress has spoken with clarity and "that is the end of the matter"—both the IRS and this Court "must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842-43.

On its face, the text of the ACA directly and unambiguously answers the question presented in this case. Consistent with *Chevron*'s careful balancing of congressional and executive prerogatives, the IRS's contrary interpretation must be rejected at step one. Because the ACA plainly does not authorize tax credits for insurance purchased through federally established exchanges, the court's *Chevron* analysis should end there. *See Texas v. United States*, 497 F.3d 491, 502 (5th Cir. 2007) ("It stands to reason that when Congress has made an explicit delegation of authority to an agency, Congress did not intend to delegate additional authority sub silentio."); *Sierra Club v. EPA*, 311 F.3d 853, 861 (7th Cir. 2002) ("It is not [an agency's] prerogative to disregard statutory limitations on its discretion because it concludes that other remedies it has created out of whole cloth are better.")

II. APPLYING THE "LEGISLATIVE GRACE" CANON FORECLOSES DEFERENCE UNDER *CHEVRON* STEP TWO

Even assuming what cannot be shown and what is hardly intuitive—that § 36B is ambiguous as to whether an exchange established by HHS also constitutes an exchange "established by the State"—the longstanding "legislative grace" statutory interpretation canon, which requires that tax credits be strictly construed, eliminates altogether the IRS's discretion to resolve that ambiguity. As this Court has consistently recognized, such interpretative principles operate at *Chevron* step one to deprive agencies of their ordinary discretion to resolve any ambiguity that may exist.

A. The Venerable Canon of "Legislative Grace" Requires That Tax Credits Be Expressed In Clear and Unambiguous Terms

Congress is the undisputed guardian of the public fisc. *See* U.S. Const. art. I, § 9, cl. 7 ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law."). Accordingly, "no money can be paid out of the Treasury unless it has been appropriated by an act of Congress." *Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 425 (1990). "Agencies and officials of the government may not spend monies from any source, private or public, without legislative permission to do so." Kate Stith, *Congress' Power of the Purse*, 97 Yale L.J. 1343, 1345 (1988). *See also United States v. Droganes*, 728 F.3d 580, 589 (6th Cir. 2013) ("A corollary of this principle is that monetary claims

potentially disruptive of the public fisc are similarly barred absent Congress's consent."); *Studio Frames Ltd. v. Standard Fire Ins. Co.*, 483 F.3d 239, 253 (4th Cir. 2007) (recognizing the "bedrock norm of authorizing no more money from the public fisc than Congress clearly intended").

This Court has long enforced the "familiar rule" that income tax exemptions, deductions, and credits are "matters of legislative grace," which must be strictly construed. *INDOPCO, Inc. v. Comm'r*, 503 U.S. 79, 84 (1992); *Interstate Transit Lines v. Comm'r*, 319 U.S. 590, 593 (1943). Accordingly, tax credits are allowed only "as there is clear provision therefor." *INDOPCO Inc.*, 503 U.S. at 84 (quoting *New Colonial Ice v. Helvering*, 292 U.S. 435, 440 (1934) and *Deputy v. Dupont*, 308 U.S. 488, 493 (1940)). Because "taxes are the lifeblood of government," *Bull v. United States*, 295 U.S. 247, 259 (1935), courts "will not lightly assume that Congress intended to subordinate the [revenue-raising] efficacy of the federal tax laws to other considerations." *In re* Berg, 121 F.3d 535, 536 (9th Cir. 1997).

This rule prevents "the control over the public funds that the [Appropriations] Clause reposes in Congress [from] in effect . . . be[ing] transferred to the Executive." *Richmond*, 496 U.S. at 425, 428. "If it were otherwise," Justice Story once cautioned, "the executive would possess an unbounded power over the public purse of the nation; and might apply all its moneyed resources at its pleasure." Joseph Story, 2 *Commentaries on the Constitution of the United States* § 1348 (3d ed. 1858).

The Court has reiterated this substantive canon of strict statutory construction for more than a century. The existence of a tax credit "must rest . . . on more than a doubt or ambiguity." *United States v. Stewart*, 311 U.S. 60, 71 (1940). Viewed as dollars in the pocket of the taxpayer that, but for the "legislative grace" of Congress, rightly belong in government coffers, tax credits must "be expressed in clear and unambiguous terms." *Yazoo & Miss. Valley R.R. Co. v. Thomas*, 132 U.S. 174, 183 (1889). Such benefits "are not to be implied; they must be unambiguously proved." *United States v. Wells Fargo Bank*, 485 U.S. 351, 354 (1988). As the D.C. Circuit has recognized, this "extremely high standard" requires that a statute "unquestionably and conclusively" establish entitlement to such a benefit. *Stichting Pensioenfonds Voor de Gezondheid v. United States*, 129 F.3d 195, 198 (D.C. Cir. 1997).

Since its creation in 1953, the IRS itself has relied on the legislative grace canon again and again to deny taxpayers deductions, credits, and exemptions whenever it is unclear that the language of the tax code permits them. Indeed, the canon has proven to be "a powerful tool for the IRS when dealing with new industries or innovative concepts." Peter A. Lowry and Juan Vasquez, Jr., *Interpreting Tax Statutes: When Are Statutory Presumptions Justified?*, 3 Hous. Bus. & L. Tax J. 389, 402 (2004). Having successfully and consistently urged application of this canon in disputes against American taxpayers, *see, e.g., MedChem (P.R.), Inc. v. Comm'r*, 295 F.3d 118, 123 (1st Cir. 2002); *Randall v. Comm'r*, 733 F.3d 1565, 1567 (11th Cir. 1984) (per curiam), the IRS should not be allowed to so easily avoid its operation in this case.

Because nothing in the ACA "unquestionably and conclusively" establishes that purchasers of insurance through a federal exchange are entitled to a tax credit, no *sub silentio* tax credit may be found to exist. Rather, any ambiguity must be resolved against the existence of such a tax credit. Only then will Congress's "exclusive authority" over taxation and public spending be preserved. *Stichting*, 129 F.3d at 197-98. *See also OMJ Pharmaceuticals, Inc. v. U.S.*, 753 F.3d 333, 336 (1st Cir. 2014) ("[B]ecause 'tax deductions and credits are matters of legislative grace,' credit should be allowed only when there is 'clear provision therefor.'") (quoting *New Colonial Ice Co.*, 292 U.S. at 440); *Packard v. C.I.R.*, 746 F.3d 1219, 1222 (11th Cir. 2014) ("Deductions and credits are matters of legislative grace and are not allowable unless Congress specifically provides for them.").

B. Because Any Ambiguity Must Be Resolved Against the Extending the Tax Credit, No Statutory Gap Remains for the IRS to Fill under *Chevron*

The Government's entire case for *Chevron* deference is premised on its claim that § 36B is ambiguous as to whether individuals who enroll for health insurance through an exchange established by HHS are eligible for tax credits under the ACA. But even if such an ambiguity existed—and it does not—the legislative grace canon requires that the ambiguity be resolved *against* the availability of the tax credit. And with any lingering uncertainty so resolved, "there is, for *Chevron* purposes, no ambiguity in such a statute." *St. Cyr*,

533 U.S. at 320 n.45. Because this analysis ends with the first step of *Chevron*, "that is the end of the matter." *Chevron*, 467 U.S. at 842-43.

Like other substantive canons, the legislative grace canon is "a means of giving effect to congressional intent, not of subverting it." *Clark v. Martinez*, 543 U.S. 371, 382 (2005). For that reason, applying the legislative grace canon in this case fully comports with the Court's understanding of *Chevron* as embodying separation-of-powers concerns. Even under *Chevron*, an agency's interpretation of a statute does not automatically prevail any time the statute contains an ambiguity. Rather, courts may "accept only those agency interpretations that are reasonable in light of the principles of construction courts normally employ." *EEOC v. Arabian Am. Oil. Co.*, 499 U.S. 244, 260 (1991) (Scalia, J., concurring in part and concurring in the judgment). Deference comes into play if, and only if, a statutory ambiguity persists after applying all the "traditional tools of statutory construction." *Chevron*, 467 U.S. at 843 & n.9. The canon of legislative grace is just such a tool.

Both the Government and the panel below cite *Mayo Foundation for Medical Education and Research v. United States*, 131 S. Ct. 704, 713 (2011) for the mere truism that "*Chevron* appl[ies] with full force in the tax context." But that is not the issue. By arguing that the question presented can be easily resolved at *Chevron* step one, Petitioners (and their *amici*) impliedly concede that the *Chevron* framework "applies" here. In any event, *Mayo* actually *reinforces* the principle that tax exemptions must be "construed narrowly." *Id.* at 715. And because the Government construed the exemption

narrowly there, both *Chevron* and the legislative grace canon reinforced one another, leading the Court to uphold the Government's narrow construction. The Government offers no explanation why the tax exemptions at issue in *Mayo* should be "construed narrowly," but the tax credits at issue here should not. Because that same canon applies with equal force here, § 36B requires a similarly narrow construction, even though the agency refuses to embrace it.

"If an interpretative principle resolves a statutory doubt in one direction, an agency may not reasonably resolve it in the opposite direction." *Carter v. Welles-Bowen Realty, Inc.*, 736 F.3d 722, 731 (6th Cir. 2013) (Sutton, J., concurring). Indeed, substantive canons of construction "forbid administrative agencies from making decisions on their own" by curtailing their "ordinary discretion" to construe an "ambiguous statutory provision." Cass R. Sunstein, *Nondelegation Canons*, 67 U. Chi. L. Rev. 315, 316 (2000). Such canons serve "to trigger democratic (in the sense of legislative) processes and to ensure the forms of deliberation, and bargaining, that are likely to occur in the proper arenas" by requiring Congress to "sp[eak] clearly" before the court will recognize a certain statutory meaning. *Id.* at 335. And because canons help to ensure "that judgments are made by the democratically preferable institution," they "trump[] *Chevron* for that very reason. Executive interpretation of a vague statute is not enough when the purpose of the canon is to require Congress to make its instructions clear." *Id.* at 331.

Viewed in this light, canons "impose constitutional limits on the delegation of legislative power. They force a democratically elected Congress to deliberate on, and then raise, a question via explicit statement by operating in a manner that constrains any interpretative discretion on the part of courts and agencies." Kenneth A. Bamberger, *Normative Canons in the Review of Administrative Policymaking*, 118 Yale L.J. 64, 80 (2008). By effectively displacing an agency's prerogative to resolve an ambiguity, such canons ensure an independent judicial interpretation of an unclear statute.[4]

This Court has repeatedly confirmed that substantive canons take precedence over conflicting agency interpretations. *See, e.g.*, *Wyeth v. Levine*, 555 U.S. 555, 576 (2009) (applying the presumption against preemption); *St. Cyr*, 533 U.S. at 289 (applying the presumption against retroactivity and the canon that ambiguous deportation statutes should be interpreted in favor of immigrants); *SWANCC v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 173 (2001) (applying the federalism canon);

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[4] A number of legal scholars have, in the context of particular canons, argued for a canon-trumps-*Chevron* rule. *See, e.g.*, Eliot Greenfield, *A Lenity Exception to* Chevron *Deference*, 58 Baylor L. Rev. 1, 61 (2006) (arguing that the rule of lenity "must trump the rule of deference"); Scott C. Hall, *The Indian Law Canons of Construction v. The* Chevron *Doctrine: Congressional Intent and the Unambiguous Answer to the Ambiguous Problem*, 37 Conn. L. Rev. 495, 497 (2004) (arguing that the "Indian law canons should trump *Chevron*"); Nina A. Mendelson, Chevron *and Preemption*, 102 Mich. L. Rev. 737, 742 (2004) (arguing that the presumption against preemption displaces the *Chevron* framework).

Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988) (applying the constitutional avoidance canon).

The Court underscored this important limit on agency deference in *Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, which ultimately reversed the Ninth Circuit for failing to defer to the FCC under *Chevron*, but only after noting that the appeals court had "invoked no other rule of construction (such as the rule of lenity) requiring it to conclude that the statute was unambiguous to reach its judgment." 545 U.S. 967, 985 (2005). *Brand X* thus confirms that a court may well find that Congress has not delegated interpretative authority to an agency either on the basis of plain statutory text *or* on the basis of some "other rule of construction." Surely this principle applies with equal force to the venerable canon of legislative grace, especially since "[t]he very reason for the interpretive principle . . . is to ensure explicit congressional authorization before certain results may be reached." Cass R. Sunstein, *Law and Administration After* Chevron, 90 Colum. L. Rev. 2071, 2113 (1990).

So long as § 36B "can reasonably be construed" to limit the tax credit to State-established exchanges, "it *must* be construed that way." *Muscogee (Creek) Nation v. Hodel*, 851 F.2d 1439, 1445 (D.C. Cir. 1988). Because "the Yazoo requirement of 'clear and unambiguous language' goes to [*Chevron*] stage one and the preliminary issue of ambiguity," the IRS's interpretation is unentitled to deference. *Oklahoma ex rel. Pruitt*, 2014 WL 4854543, at *7 n.20. *See also Welles-Bowen*

Realty, 736 F.3d at 731 (Sutton, J., concurring) ("Rules of interpretation bind *all* interpreters, administrative agencies included."); *Massachusetts v. U.S. Dep't of Transp.*, 93 F.3d 890, 893 (D.C. Cir. 1996) (recognizing that "time-honored canons of construction . . . constrain the possible number of reasonable ways to read an ambiguity in a statute.").

CONCLUSION

For the foregoing reasons, *amici curiae* Washington Legal Foundation and Steven J. Willis respectfully request that the Court reverse the holding of the Fourth Circuit and vacate the IRS Rule.

Respectfully submitted,

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